Gaughran vs the UK and public acceptability of forensic biometrics retention

Aaron Amankwaa[1,2]

Carole McCartney[1]

[1]*Science and Justice RIG, School of Law, Northumbria University*

[2]*Forensic Science Unit, Department of Applied Sciences, Northumbria University*

Gaughran vs the UK and public acceptability of forensic biometrics retention

Abstract

This commentary provides a response to the European Court of Human Rights ruling in the case of *Gaughran vs the United Kingdom* on 13 February 2020. The Court ruled that the indefinite retention of DNA, fingerprints and facial images from all convicted adults was disproportionate. Using data from a survey on public attitudes, we examine the public acceptability of the police retention of forensic biometrics from the population.

Keywords: Forensic biometrics, forensic databases, retention, privacy, public security, public attitudes

Highlights

- ECHR rules indefinite retention of forensic biometrics is disproportionate
- Forensic biometrics retention should consider the gravity offence and necessity
- Available evidence suggests the ECHR ruling may be acceptable to the public
- Representative public survey and empirical evidence needed to reform current law

Introduction

On 13th February 2020, the European Court of Human Rights (ECHR) ruled that indefinite retention of forensic biometrics from all convicted individuals was disproportionate [1]. This conclusion runs counter to the legal framework of retention under the current Protection of Freedoms Act 2012 (PoFA) regime which supports the indefinite retention of DNA and fingerprints in England, Wales and Northern Ireland. The ECHR case, *Gaughran vs the UK*, involved a man from Northern Ireland, whose biometrics (DNA profile, fingerprints and photograph) were retained indefinitely by the police following a drink-driving conviction in 2008. Gaughran argued that retaining his biometric information long after his conviction had been spent, was a breach of his right to privacy (Article 8).

The Government argued that the UK regime fell within the margin of appreciation and was comparable with other regimes across Europe. Further, indefinite retention was relevant to the prevention, detection, investigation and prosecution of crime. The Court, however, noted the absence of certain key safeguards and considerations in the retention of biometrics from convicted individuals, namely the gravity of the offence, necessity of indefinite retention and opportunities for review of retention. The Court concluded that the domestic legislation that permits indefinite retention following any criminal conviction, was not proportionate, echoing the decision in 2008 in the case of *S and Marper vs the United Kingdom* [2], that the UK retention of forensic biometric data was unlawful. It was this ruling that led to the enactment of the PoFA regime. This latest ruling must now once again prompt consideration of the legal rules governing the police retention of biometric data.

Since the establishment of the England and Wales National DNA Database (NDNAD) in 1995, the legal framework governing the database has evolved through a series of legislative reforms and faced ethical challenges. The first legal framework established a restrictive regime whereby the indefinite retention of forensic biometrics was limited to convicted individuals. The biometrics of individuals who had been arrested, but never convicted of crime were required to be destroyed after an investigation or any proceedings had concluded. Some prosecutions involving unlawful matches, such as *R v Weir* [3], informed a change in the legal regime due to concerns about public security and the inability of the police to resolve crime.

Between 2001 and 2003, the legal framework for forensic biometrics was reformed to an expansive regime which allowed indefinite retention of forensic biometrics from anybody who was arrested for a recordable offence (generally an offence leading to a prison sentence). This regime was that which was challenged in the *Marper* case of 2008. The case involved two complainants who were charged for separate recordable offences but were acquitted or their case discontinued. The Grand Chamber ruled unanimously that the indefinite retention of their biometric data violated Article 8. This decision instigated a series of debates and government consultations that ultimately led to the enactment of the PoFA regime.

Under the current regime, the police cannot retain the biometrics of individuals who have been arrested but have never been convicted of a crime, following the conclusion of investigations or proceedings. The only exception is where the individual is arrested or charged for a qualifying offence (serious offence), where a maximum of 5 years retention is allowed. For convicted adults, their biometrics can be retained indefinitely, with no differentiation in respect of the crime committed or the sentence received. The *Gaughran* ruling, however, suggests a need for a more discriminatory approach for convicted adults.

Is there public support for this approach in the UK?

Our survey of 201 citizens/residents of England and Wales suggests strong support for a discriminatory retention regime for convicted adults [4]. Conducted between June and October 2018, around 83% of participants favoured long-term retention (indefinite/100 years/until death of individuals) of DNA profiles from adults convicted of a serious offence. Less than half (47%) of the participants supported long-term retention for adults convicted of minor offences and 38% favoured a retention approach based on the length of sentence for the conviction of a minor offence.

One of the key reasons in favour of the long-term retention of biometrics was the potential of the data to enhance the public security aims of the criminal justice system, such as the prevention, detection, investigation and prosecution of crime. Support was often justified by the high level of recidivism, with one participant stating that “people can flip at any point in time so the longer we have it [biometrics] in the system, the better.’

In contrast, participants who favoured a discriminatory approach, based on the type of offence, age, and length of sentence, appealed to the concept of rehabilitation and that convictions could be “spent”. The following comment by one participant illustrates the justification:

> "[T]he offender should be able to feel that they have made amends for their offence through completing their sentence to be able to move on with their lives. The retention of their DNA signifies that the State does not believe they have changed and expects them to reoffend. 1 year after the end of their sentence should be sufficient to catch those prolific offenders who reoffend within a year of release… (…) It is a means of the state showing trust and respect for them."

The government, in enacting the PoFA regime, and in their defence of *Gaughran*, also argued that retention on an indefinite basis of any convicted individual could be justified by public security needs. However, this argument lacks weight when considering the actual effectiveness of the retention of DNA and other biometrics in crime resolution. While the potential effectiveness of the database would seem to be enhanced by having as many DNA profiles on the database as possible, this is not true. After the deletion of 1m+ profiles following the Marper ruling, the NDNAD match rate increased [5]. Research makes clear that it is not the size of the database that determines its effectiveness in resolving crime, but other factors are critical, such as whose data is retained, and whether the NDNAD is used to best effect in respect of loading DNA profiles from relevant crime scenes and the police follow-up of DNA 'matches' [6].

In summary, the ECHR ruling in *Gaughran vs the UK* must prompt another reconsideration of where the lines should be drawn in respect of whose biometric data should be retained by the police, and for how long. Any regime must be acceptable to the public and a wider consultation is required to reform the current PoFA regime. This will also be critical in wider debates about the police use of biometrics, particularly in respect of facial images with the controversy surrounding Live Facial Recognition. Our survey was based on a non-representative sample of the public. Hence, a more representative survey is needed to understand public attitudes towards the retention rules for forensic biometrics. This information should be complemented with empirical data on the value of biometric retention to inform policymakers about the most appropriate framework for forensic biometric databases.

Conflicts of interest

The author(s) have no conflicts of interest

References

[1] Gaughran v the United Kingdom [2020] ECHR 144.
[2] S and Marper v the United Kingdom [2008] ECHR 1581.
[3] R v Weir [2000] EWCA Crim 43.
[4] Amankwaa AO. Forensic DNA databasing: retention regimes and efficacy. PhD. University of Northumbria at Newcastle, 2019.
[5] FIND Strategy Board. National DNA Database: annual report, 2017 to 2018. London: Forensic Information Database Strategy Board; 2019.
[6] Amankwaa AO, McCartney C. The effectiveness of the UK national DNA database. Forensic Sci Int Synergy 2019;1:45–55. https://doi.org/10.1016/j.fsisyn.2019.03.004.